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No. 81-2150
IN THE

Supreme Court of the United States

October Term, 1981

JIM MCNEFF, INC., a California Corporation,
Petitioner,

vs.

FRANK L. TODD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION.

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Questions Presented.

1. Is a Section 8(f) agreement enforceable as a contract in a Section 301 suit before the union achieves majority status as representative of the employees covered by the agreement?

2. Is a Section 8(f) agreement rendered void because the employer signed the agreement in order to remain eligible for work on a construction jobsite where the general contractor and the union had agreed to a union signatory subcontracting clause?

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BRIEF IN OPPOSITION.

Respondents Frank L. Todd, et al., pray that the petition for a writ of certiorari to review the decision issued on February 8, 1982, by the U.S. Court of Appeals for the Ninth Circuit be denied. The decision of the Court of Appeals is officially reported at 667 F.2d 880.

Statement of the Case.

Jim McNeff, Inc. ("McNeff, Inc.") signed a collective bargaining agreement ("Agreement") with the International Union of Operating Engineers, Local Union No. 12 ("Local 12") on September 13, 1978, after being told by a representative of Local 12 and a superintendent of the general contractor on a construction project that McNeff, Inc. would be required to sign the Agreement in order to continue performing work as a subcontractor on the project. After signing the Agreement, the President of McNeff, Inc. complied with the Agreement by informing all three employees that the Agreement would require the employees to join

Local 12 as a condition of continued employment. All three employees signed documents necessary to join Local 12 and were dispatched by Local 12 as employees covered by the Agreement on the same day.

The Agreement obligated McNeff, Inc. to report all hours of employment and pay contributions at specified hourly rates to the Operating Engineers Health & Welfare Fund, Operating Engineers Pension Trust, Operating Engineers Vacation-Holiday Savings Trust and Operating Engineers Training Trust (the "Trusts") on behalf of each employee covered by the Agreement. From the signing of the Agreement until March, 1979, McNeff, Inc. further complied with the Agreement by filing monthly report forms furnished by the Trusts, but falsely reporting that "no members of this craft were employed during this month."

In March, 1979, a representative of the Trusts requested access to the payroll records of McNeff, Inc. for the purpose of performing an audit. When McNeff, Inc. eventually refused to permit the audit, the Trustees filed a complaint in this action on April 26, 1979. The Trustees obtained access to the required payroll records through pretrial discovery proceedings in this action. When performed, the payroll audit covered an interval from the signing of the Agreement on September 13, 1978, through April 30, 1979. The amount of fringe benefit contributions, liquidated damages for late payment, and audit expense found to be due under the Agreement for that interval was $5,316.79.

A motion for summary judgment was filed on behalf of the Trusts seeking recovery of the amount shown to be due by the audit. McNeff, Inc. sought to avoid the summary judgment by arguing that the Agreement was unenforceable for two reasons: (1) the Trusts had not proved that Local 12 had achieved a majority status among covered employees; and (2) the Agreement was signed by McNeff, Inc.

under coercion by Local 12. McNeff, Inc. also informed the district court that the General Counsel of the National Labor Relations Board ("NLRB" or "Board") had declined to issue a complaint against McNeff, Inc. based on a refusal to bargain charge filed by Local 12 under Section 8(a)(5) of the National Labor Relations Act ("Act"), and that McNeff, Inc. had filed a petition for a union representation election with the NLRB, but that the election results had not been certified at the time of hearing on summary judgment. On February 11, 1980, the district court entered summary judgment for the Trusts in the full amount shown to be due by the payroll audit covering the interval from September 13, 1978, through April 30, 1979, plus attorneys' fees.

On the employer's appeal, the U.S. Court of Appeals for the Ninth Circuit held that the Agreement signed by McNeff, Inc. and Local 12 pursuant to Section 8(f) of the Act is judicially enforceable as a contract obligation until an effective repudiation of the Agreement. The Court of Appeals further held that the conduct of McNeff, Inc. "enjoying the benefits of a pre-hire agreement and misleading the union as to the employer's intention of never performing its obligations" did not constitute an effective repudiation. (Pet. App., p. 8.) In *dictum*, the Court of Appeals observed that the majority status of Local 12 would become relevant only if an effective repudiation had occurred, and then would be relevant only insofar as prior attainment of majority status would bar a subsequent repudiation. (Pet. App., pp. 6-7.)

REASONS FOR DENYING THE WRIT.

Summary.

The decision of the Court of Appeals provides judicial enforcement for Section 8(f) agreements during the contract interval occurring before an effective repudiation by the signatory employer. This holding is supported by the previously stated views of this Court, is in accord with results reached in decisions by the Eighth Circuit and the Tenth Circuit, and is in accord with the language and legislative intent of the statute.

In addition, the Court of Appeals held on the specific facts of this case that the conduct of McNeff, Inc. did not constitute an effective repudiation of the Agreement with Local 12. This holding is supported by the factual record, and does not present a question of significance for review by this Court.

Finally, without deciding whether Local 12 used "coercion" to obtain execution of the Agreement by McNeff, Inc., the Court of Appeals held that an employer has a sufficient remedy for a coerced agreement through repudiation, and that coercion is not a defense to judicial enforcement of a Section 8(f) agreement prior to repudiation.

This case does not raise the issue of whether a Section 8(f) agreement is judicially enforceable after the NLRB has certified the union's loss of a representation election. The complaint in this case sought enforcement of the Agreement for the period covered by the payroll audit, which ended April 30, 1979. At that time, no petition for election had been filed by the employer, and certainly no election results had been certified by the NLRB.

Likewise, this case does not raise the issue of whether a union may obtain a Section 8(f) agreement by picketing an employer, because no picketing occurred. McNeff, Inc.

voluntarily signed the Agreement in order to obtain the benefits of the Agreement by remaining eligible for work as a subcontractor for a general contractor with a union signatory subcontracting agreement.

ARGUMENT.

I.

The Court of Appeals Correctly Held That a Section 8(f) Agreement Is Judicially Enforceable Until Repudiated.

Determining whether an agreement permitted by Section 8(f) can be repudiated by either party involves statutory interpretation. When interpreting any statute, the language of the statute is conclusive in the absence of a clearly expressed legislative intention to the contrary. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056 (1980). The express language of Section 8(f) (Pet., pp. 3-4) authorizes a construction employer "to make an agreement" with a union, and says nothing specifically about "repudiation" of such an agreement. However, the last proviso of Section 8(f) states that any such agreement "shall not be a bar to a petition filed pursuant to Section [9(c) or 9(e) of the Act]." 29 U.S.C. § 158(f). Thus, the only avenue for repudiation within the language of the statute is contained in the context of a petition for a union representation election filed with the NLRB by the employees or the employer.

The legislative history of Section 8(f) provides no basis for broadening the means for repudiating prehire agreements beyond the petition process provided by the language of the statute. The relevant legislative intent has been expressed by this Court as follows:

> "There were two aspects peculiar to the building trades that Congress apparently thought justified the use of pre-hire agreements with unions that did not represent a majority of the employees:
>
> 'One reason for this practice is that *it is necessary for the employer to know his labor costs* before

> making the estimates upon which his bid will be based. A second reason is that *the employer must be able to have available a supply of skilled craftsmen* ready for quick referral.' " (Emphasis added.) *NLRB v. Local Union No. 103, Ironworkers* ("*Higdon*"), 434 U.S. 335, 348, 98 S.Ct. 651, 659 (1978).

Cf., Pet. App., pp. 3, 7, 8. See, also, *Pacific Northwest Chapter v. NLRB*, 654 F.2d 1301, 1309, 1311 (9th Cir. 1981); *affirmed sub nom. Woelke & Romero Framing, Inc. v. NLRB*, ____ U.S. ____, 50 USLW 4538 (May 24, 1982). Obviously, if either the employer or the union could repudiate by simply breaching or disavowing a Section 8(f) agreement at any time before majority status is achieved, the congressional purpose of enabling employers to obtain binding commitments concerning wages and skilled workmen for use in preparing competitive bids for construction contracts would not be achieved.

Accordingly, in *Higdon* this Court recognized that a Section 8(f) agreement is "voidable", 434 U.S. at 341, 98 S.Ct. at 655-56, and acknowledged only the rights of the employees and the employer to petition for an election under Section 9 of the Act as the appropriate avenues for repudiating the agreement.[1]

The decision of the Court of Appeals that a Section 8(f) agreement is binding and judicially enforceable finds ad-

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[1]This Court's statements in *Higdon* are as follows:

(1) "The employer and its employees — and the union itself for that matter — may call for a bargaining representative election at any time." 434 U.S. at 345, 98 S.Ct. at 657.

(2) "The proviso expos[es] unions with prehire agreements to inquiry into their majority standing by elections under Section 9(c) . . ." *Id.*

(3) "Hence the proviso that an election could be demanded despite the prehire agreement." 434 U.S. at 349, 98 S.Ct. at 659.

ditional support in an analogy provided by this Court in the *Higdon* decision. In explaining that Section 8(f) is not rendered meaningless by the Court's holding that picketing to enforce prehire agreements is limited by Section (b)(7) of the Act, the Court refers to a "comparable situation . . . concerning hot cargo clauses . . . permitted . . . by Section 8(e) . . ., but which cannot be enforced by picketing." 434 U.S. at 349, 98 S.Ct. at 659-60, n. 11. In that "comparable situation", hot cargo clauses are judicially enforceable. See, *Woelke & Romero, Inc. v. NLRB, supra*, ___ U.S. ___, 50 USLW at 4540-41.

Thus, neither the express language of Section 8(f), nor its legislative history, nor the *Higdon* decision supports the petition's arguments that agreements made under Section 8(f) are completely nonbinding and may be avoided by simple breach of their terms. The Court of Appeals merely gave careful and logical effect to views previously expressed by this Court.

II.

The Repudiation Issue Presented by This Case Is Limited to the Sufficiency of the Employer's Conduct to Constitute an Effective Repudiation of the Section 8(f) Agreement.

The Court of Appeals found that McNeff, Inc. had retained the benefits of the Agreement with Local 12 while breaching its terms, and concluded that such conduct was not an effective repudiation of the Agreement. The Trustees' motion for summary judgment sought and obtained enforcement of the Agreement for the interval covered by the payroll audit ending April 30, 1979. The Court of Appeals was not called upon to specify what more McNeff, Inc. might have done to cut short its contract obligations by repudiation prior to that date.

Neither was the Court of Appeals required to determine whether the November 17, 1980, certification by the NLRB that Local 12 "is not the exclusive representative" of the operating engineer employees of McNeff, Inc. amounted to an effective repudiation which terminated the employer's obligations under the Agreement on that date. Such a result is certainly not foreclosed by the decision of the Court of Appeals and, thus, is left for decision in another case (*e.g.*, a case seeking enforcement of the Agreement through November 17, 1980, and thereafter). In this light, the assertion in the petition that the decision of the Court of Appeals renders meaningless the election process of the Act is unwarranted.[2]

III.

The Record in This Case Does Not Show That Local 12 Used Unlawful Coercion in Obtaining Execution of the Section 8(f) Agreement by McNeff, Inc.

The petition asks the Court to "assume" that Local 12's conduct amounted to coercion so that the Court may then decide whether the presence of such "assumed" coercion

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[2]Likewise, the assertion in the petition that decisions in the Eighth Circuit and Tenth Circuit make the election process of the NLRB "totally irrelevant" is overbroad and erroneous. Neither *Contractors, etc. v. Associated Wrecking Company*, 638 F.2d 1128 (8th Cir. 1981), nor *New Mexico District Council of Carpenters v. Mayhew Company*, 664 F.2d 215 (10th Cir. 1981), involved enforcement of a Section 8(f) agreement for a term after the date of an NLRB certification of election results. Clearly, the decisions of the Eighth, Ninth and Tenth Circuits leave room for a proper accommodation of the NLRB election process in future cases.

On the other hand, the erroneous decision in *Baton Rouge Building and Construction Trades Council v. E.C. Schafer Construction Company, Inc.*, 657 F.2d 806 (5th Cir. 1981), makes Section 8(f) largely meaningless by declaring prehire agreements to be unenforceable until union majority status is established. An "agreement" has no meaning if the parties cannot rely upon its terms. The very essence of Section 8(f) authorizes agreements to be made before union majority status has been or can be established.

would cause the Agreement to be judicially unenforceable. (Pet., p. 7, n. 3.) Such a hypothetical factual record is not a proper basis for review and decision by this Court.

The record shows that McNeff, Inc. signed the Agreement after being told by a representative of Local 12 and a representative of a general contractor that McNeff, Inc. could continue work as a subcontractor on the construction project of the general contractor only if McNeff, Inc. would sign an agreement with Local 12. (Pet., p. 4.) This Court recently stated:

> "When a union obtains a subcontracting clause from a general contractor, subcontractors frequently attempt to ensure that they remain eligible for work by entering into a Section 8(f) agreement — known as a prehire agreement — with the union." *Woelke & Romero, Inc. v. NLRB, supra*, ____ U.S. ____, 50 USLW at 4543.[3]

The decision by McNeff, Inc. to sign the Agreement was entirely voluntary in the sense that the employer could freely choose to sign the Agreement or discontinue working as a subcontractor on the construction project. A voluntary act is not distinguished from a coerced one merely by the absence or presence of economic considerations. Such considerations are undoubtedly present whenever a Section 8(f) agreement is signed, which, as noted by this Court in *Woelke & Romero*, frequently occurs.

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[3]However, this Court expressly reserved "the question whether a union may picket to obtain a pre-hire agreement." *Id.*, n. 17. No picketing was involved in the signing of the Agreement by McNeff, Inc. and Local 12.

IV.

The Decision of the Court of Appeals Granting Judicial Enforcement of the Agreement Is Entirely Consistent With the Decision of the Board's General Counsel Declining to Charge a Violation of Section 8(a)(5) of the Act.

The premise of the petition that this case reflects important conflicts in national labor policy as administered by the NLRB, the Court of Appeals and this Court springs primarily from a misconception on the part of petitioner. That misconception is reflected in the petition's erroneous statement that the "pivotal question before the Court of Appeals was . . . the same question presented to this Court in [*Higdon*]." (Pet., p. 12.) Of course, the questions presented by the two cases are importantly different. This case presents the question whether a Section 8(f) agreement signed by an employer with a minority union is judicially enforceable in a Section 301 action. The question before this Court in *Higdon* was whether a minority union could picket *to enforce* a Section 8(f) agreement without the time limitations imposed by Section 8(b)(7)(C) of the Act on picketing for recognitional purposes. The Court affirmed the view of the Board that the signing of a Section 8(f) agreement does not enable a minority union to avoid the Section 8(b)(7)(C) limitation on picketing. *Higdon*, 434 U.S. at 346, 98 S.Ct. at 658.

This Court recognized in *Higdon* that, under the policies of the Act, the Board will not use its resources to seek enforcement of a collective bargaining agreement by pursuing government litigation under Section 8(a)(5) of the Act when the union party to the agreement does not represent a majority of the covered employees. Thus, in the absence of a majority union, no violation of public policy as expressed in Section 8(a)(5) occurs when an employer

breaches a Section 8(f) Agreement. *Higdon*, 434 U.S. at 344-45, 98 S.Ct. at 657-58. In this light, whether an employer may "repudiate" an agreement with a minority union without fear that the Board's General Counsel will issue a complaint charging violation of Section 8(a)(5) is a materially different concern from whether the employer may breach his consensual agreement without being subject to a judicial suit for enforcement.[4]

The Court of Appeals recognized this distinction and concluded that Congress intended a Section 8(f) agreement to be binding and judicially enforceable, while at the same time intending that NLRB resources be reserved to prosecute breaches of the agreement as violations of public policy only after the union has demonstrated majority support among the covered employees.

Conclusion.

Based on the foregoing, the petition for a writ of certiorari should be denied.

Dated: June 15 1982.

Respectfully submitted,

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[4]The General Counsel's dismissal of Local 12's Section 8(a)(5) charge amounted to a ruling that the existing agreement would not be a bar to the petition for election filed by McNeff, Inc. since majority status had not been shown adequately by Local 12. This is in accord with the language of Section 8(f) and the law under Section 8(a)(5). See, *Higdon*, 434 U.S. at 343-45, 98 S.Ct. at 656-57. The dismissal of a Section 8(a)(5) charge does not eradicate the Section 8(f) agreement as a nullity, as the petition urges, but merely allows the election processes of the Board to operate as Section 8(f) provides.